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No. 85-1653

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN J. BALISTRIERI AND JOSEPH P. BALISTRIERI,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial judge who was originally assigned to this case committed reversible error in failing to recuse himself until six months before the trial.

2. Whether the district court abused its discretion by transferring this case to another location within the district for purposes of jury selection.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 778 F.2d 1226.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1985 (Pet. App. A80-A81). A petition for rehearing was denied on January 8, 1986 (Pet. App. A82-A83). On February 28, 1986, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including April 8, 1986, and the petition was filed on April 7, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a six-week jury trial in the United States District Court for the Eastern District of Wisconsin, petitioners were convicted of attempting and conspiring to obstruct commerce by means of extortion, in violation of 18 U.S.C. 1951. Each was sentenced to eight years' imprisonment and a $20,000 fine. Pet. App. A2. The court of appeals affirmed (*id.* at A1-A12).

1. The convictions in this case resulted from an FBI undercover investigation of organized crime activities in the Milwaukee, Wisconsin, area. During October 1981, a grand jury returned several indictments as a result of the investigation. The first indictment charged seven defendants, including petitioners' father, Frank Balistrieri, with various gambling and tax offenses stemming from an illegal gambling business in Milwaukee. That case was tried in September 1983, and it resulted in the conviction of five of the defendants on various counts. Three of the convicted defendants—including Frank Balistrieri—appealed, and their convictions were affirmed by the court of appeals (Pet. App. A13-A79; 799 F.2d 1191, cert. denied, No. 85-1187 (Mar. 31, 1986)).

The second indictment was the one that resulted in the convictions in this case. The trial on that indictment took place in March and April 1984. The evidence adduced at trial, the sufficiency of which is not in dispute, is summarized in the court of appeals' opinion (Pet. App. A2-A3). It showed that from May 1978 to February 1979, petitioners conspired with their father and others to extort money and a one-half partnership interest in a vending machine company that was operated by an undercover FBI agent.

2. Prior to the trials in this case and in the gambling case, petitioners and their father moved to disqualify Judge Robert Warren, who had been assigned to try the two cases. The motions were based principally on the claim that while Judge Warren had served as the Attorney General of Wisconsin, during the period from 1969 to 1971, he had formed a belief that Frank Balistrieri was the head of the Mafia in Milwaukee. Pet. App. A15.

The first recusal motion was filed in October 1981, shortly after the return of the indictments. According to the affidavit of Frank Balistrieri that accompanied the motion, Judge Warren, while serving as Attorney General, set into operation a systematic program to ruin Frank Balistrieri and to destroy businesses with which he or his relatives were associated. Pet. App. A16. After carefully considering the factual allegations in the affidavit, Judge Warren denied the motion. He concluded that, even accepting the allegations as true, the affidavit failed to demonstrate that he was personally biased against Balistrieri. Judge Warren also concluded that a reasonable person, knowing all of the facts, would not question his impartiality. Accordingly, he held that the defendants had failed to show that recusal was required under 28 U.S.C. 144 or 455, the applicable disqualification statutes.[1] 1 App. 154-157.[2]

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[1] Judge Warren had considered the issues raised in the first motion in an earlier proceeding, and there denied the motion for recusal in what the court of appeals referred to as "a thorough and thoughtful memorandum opinion" (Pet. App. A15 n.1).

[2] "1 App." refers to the appendix filed by the appellants in their appeal from the convictions in the gambling case (Pet. App. A13-A79); "2 App." refers to the appendix filed on appeal in the instant case.

In July and August 1983, shortly before the trial of Frank Balistrieri in the gambling case, petitioners and their father filed two more recusal motions. Like the 1981 motion, those motions were based on events during Judge Warren's tenure as Attorney General. The second recusal motion relied on an affidavit by one John Forbes, who alleged that between 1968 and 1970 he had been an informant for an investigator with the Wisconsin Department of Justice and that, during that period, the investigator had asked him to do a number of things, some of them unlawful, in order to obtain evidence against Frank Balistrieri. Judge Warren denied that motion. He noted that the affidavit did not suggest that he was aware of any improper activities by Forbes or the state investigator, and he concluded that the allegation that he had overseen an investigation of organized crime in Wisconsin in 1969 was not legally sufficient to raise a question about his impartiality in a case involving unrelated activities almost 14 years later.

The third recusal motion, which was filed shortly before the gambling trial, was based on an affidavit of one Terrence Joseph Donley, who claimed that at some point in 1970 Attorney General Warren had said in his presence that he was going to "get Frank Balistrieri" and that he was going to "put Frank Balistrieri back in prison for the rest of his life." Judge Warren denied that motion on grounds of untimeliness, noting that the motion had been filed virtually on the eve of trial and that under the circumstances it appeared that the motion had been filed for purposes of delay. 1 App. 166-170, 180-182, 189-193.

Less than a week after the third motion had been filed, petitioners and their father filed a fourth and

final recusal motion. That motion was based on affidavits from Frank Balistrieri, his attorney, and petitioner John J. Balistrieri. In his affidavit, Frank Balistrieri repeated his belief that Judge Warren had a personal bias against him, he reiterated the factual allegations of his previous affidavits, and he charged that at a recent social gathering Judge Warren had stated that he was delighted to have an opportunity to "put Frank Balistrieri away." At the time of the filing of the fourth recusal motion, a Milwaukee attorney issued a press release charging that Judge Warren was personally responsible for an alleged 1969 burglary of his law office and the theft of a client file relating to his representation of Frank Balistrieri. The attorney announced that he intended to file a civil lawsuit against Judge Warren based on that alleged incident. Pet. App. A15-A16, A19-A20.

Judge Warren granted the fourth recusal motion. Although denying the allegations recited above, Judge Warren concluded that in light of all the charges the defendants had leveled against him, a reasonable person might question his impartiality in the case. Pet. App. A16. After Judge Warren recused himself, the case was transferred to Judge Terence Evans (*id.* at A14).

From that point on, Judge Evans presided over all aspects of both the gambling case and the extortion case, including pretrial motions, the trials, and all post-trial proceedings. In March 1984, six months after Frank Balistrieri's trial on the gambling indictment, Judge Evans presided over petitioners' trial in the extortion case. Prior to the extortion trial, Judge Evans decided to move jury selection for the case from the Milwaukee division to the Green Bay division of the Eastern District of Wisconsin,

principally because of the wide publicity given to the gambling trial in Milwaukee and the difficulties that that publicity would present for jury selection.

3. The court of appeals affirmed petitioners' convictions (Pet. App. A1-A12). The court found no error in the recusal decisions (*id.* at A3-A4) and no error in the district judge's decision to transfer the case for purposes of jury selection (*id.* at A4-A6).

a. The court of appeals noted that the recusal claim was essentially the same one that Frank Balistrieri had raised on appeal from his convictions in the gambling case, and the court adopted the analysis it had employed there (Pet. App. A3-A4). In that earlier opinion (*id.* at A15-A33), the court discussed in some detail the affidavits themselves, and it then discussed the applicability of the three relevant recusal statutes, 28 U.S.C. 144, 455(a) and 455(b)(1).

In the gambling case, the court of appeals noted that 28 U.S.C. 144 requires a judge to recuse himself if a party files a timely and sufficient affidavit claiming that the judge has "a personal bias or prejudice" against him. The court further noted that it was bound to accept as true the factual averments contained in the affidavit filed with the first recusal motion.[3] The court of appeals concluded, however, that the averments in the affidavit filed in this case would not convince a reasonable person that Judge Warren was biased against Frank Balistrieri or his sons (Pet. App. A20-A27). The court pointed out that the affidavit was confined to events that occurred

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[3] The court considered only the affidavit filed with the first motion because 28 U.S.C. 144 permits the filing of only one affidavit (see Pet. App. A22-A23 & n.6). The other affidavits were considered with regard to petitioners' claim under 28 U.S.C. 455(b)(1), however.

10 to 12 years earlier, and the events related to the affidavit bore no relationship to the charges in the indictment. The court also observed that the statements and actions attributed to Judge Warren did not demonstrate that he was motivated by personal animus against Frank Balistrieri: at most, they evidenced actions motivated by then-Attorney General Warren's desire to carry out the duties of his office.

Similarly, the court held (Pet. App. A27-A31) that Judge Warren was not required to recuse himself pursuant to 28 U.S.C. 455(b)(1), which requires disqualification when the judge "has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts." After carefully reviewing the affidavits filed in support of the various recusal motions, the court of appeals concluded that none of them had the necessary relevance and credibility to require recusal. "Because the charge of actual bias or prejudice in a judge goes to the heart of the integrity of the judicial process" (Pet. App. A31), the court also examined all the pretrial orders entered by Judge Warren and found no indication that his rulings were affected by bias or prejudice. The court noted that several of the motions that had been denied by Judge Warren—"presumably those in which [petitioners' father] had the greatest interest" (*ibid.*)—were resubmitted to Judge Evans before and after trial, and that Judge Evans had made independent rulings on them.

Finally, the court refused to consider (Pet. App. A32-A33) whether Judge Warren's denial of the first three recusal motions ran afoul of 28 U.S.C. 455(a), which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." The court concluded that the

denial of a disqualification motion that is made pursuant to Section 455(a) is not reviewable on appeal following a conviction, but may be reviewed only prior to trial by way of a petition for a writ of mandamus.

b. Regarding the intra-district transfer of the case for purposes of jury selection (Pet. App. A5-A6), the court of appeals discussed the district judge's reasons for the transfer and the broad discretion afforded him under Fed. R. Crim. P. 18 to order transfer within the district. After reviewing the reasons given by the district court for ordering the transfer, the court of appeals concluded that the district court did not abuse its discretion by ordering a limited transfer of the case. The court found "somewhat amazing" petitioners' arguments that the district court had failed to substantiate its concern about adverse publicity from the earlier trials, since petitioners' father, who was appealing with them, had argued in the earlier case that he was entitled to a new trial on account of that publicity (Pet. App. A6). The court of appeals concluded that "[t]here was ample reason for Judge Evans to be concerned about the ability of the parties to select quickly an unbiased jury," and that his decision was consequently "quite prudent[]" (*ibid.*).

ARGUMENT

Petitioners contend that the court of appeals erred in refusing to order a new trial on the ground that Judge Warren's recusal came too late and on the ground that the jury was improperly selected. The ruling of the court of appeals on both issues was correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. a. Petitioners first contend (Pet. 9-13) that the affidavit filed in support of the first recusal motion, which chronicled law enforcement efforts against Frank Balistrieri and his businesses while Judge Warren was Attorney General of Wisconsin, established the necessary bias or prejudice against the Balistrieri family to compel Judge Warren's recusal. According to petitioners, the court of appeals erred in holding that the bias or prejudice necessary to require a judge's recusal under the judicial disqualification statutes must be grounded in "personal animus" going beyond the judge's contact with a defendant in his earlier role as a prosecutor.

The two principal recusal statutes, 28 U.S.C. 144 and 455(b)(1), require a district judge to recuse himself upon a showing that he has a "personal bias or prejudice" against one of the parties. A party's allegation must establish actual bias on the part of the judge. Because a judge is presumed to be impartial, the party seeking recusal "has a substantial burden to overcome the presumption with factual allegations of personal bias stemming from an extrajudicial source." *United States* v. *Baskes*, 687 F.2d 165, 170 (7th Cir. 1981) (citations omitted); *In re International Business Machines Corp.*, 618 F.2d 923, 928-929 (2d Cir. 1980).

A law enforcement official's involvement in legal proceedings against an individual is not sufficient to show personal bias. In so holding, the court of appeals was not adding a new requirement for recusal. It has been consistently held that a judge is not disqualified from presiding over a defendant's trial for offenses different from those for which he prosecuted the defendant while he was serving as a prosecutor;[4]

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[4] See, *e.g.*, *Jarrell* v. *Balkcom*, 735 F.2d 1242, 1258-1259 (11th Cir. 1984), cert. denied, No. 84-5484 (May 13, 1985);

the petition cites no cases to the contrary. That rule follows from the more general principle that a judge's "background of experiences, associations and viewpoints" is ordinarily not enough to require recusal; rather, "a reasonable suspicion of bias will usually arise only in the presence of such factors as a financial or strong personal interest in one of the litigants." *Brody* v. *President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981), cert. denied, 455 U.S. 1027 (1982).

In this case, the court of appeals properly concluded that the steps Attorney General Warren may have taken against Frank Balistrieri between 1969 and 1971 did not manifest any personal bias on his part against Balistrieri, and thus did not require his recusal. In the affidavit accompanying the first recusal motion, petitioners based their claim of bias merely on Attorney General Warren's conduct of his official duties; those allegations, however, did not reflect any personal prejudice that would require Judge Warren's disqualification in a case filed more

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United States v. *Outler*, 659 F.2d 1306, 1312-1313 (5th Cir. 1981), cert. denied, 455 U.S. 950 (1982); *Margoles* v. *Johns*, 660 F.2d 291, 301 (7th Cir. 1981), cert. denied, 455 U.S. 909 (1982); *Corbett* v. *Bordenkircher*, 615 F.2d 722, 723-724 (6th Cir.), cert. denied, 449 U.S. 853 (1980); *Jenkins* v. *Bordenkircher*, 611 F.2d 162, 165-167 (6th Cir. 1979), cert. denied, 446 U.S. 943 (1980); *United States* v. *Dansker*, 537 F.2d 40, 52-54 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977); *In re Grand Jury Investigation*, 486 F.2d 1013, 1015-1016 (3d Cir. 1973), cert. denied, 417 U.S. 919 (1974); *Gravenmier* v. *United States*, 469 F.2d 66, 67 (9th Cir. 1972); see generally *Barry* v. *United States*, 528 F.2d 1094, 1099-1100 (7th Cir.), cert. denied, 429 U.S. 826 (1976).

than a decade later.[5] As the court stated in *United States* v. *Dansker*, 537 F.2d 40, 53-54 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977) (emphasis and brackets in original), quoting *Parker Precision Prods. Co.* v. *Metropolitan Life Ins. Co.*, 407 F.2d 1070, 1077-1078 (3d Cir. 1969):

> [A]llegations that the trial judge, during the course of his duties as United States Attorney, investigated, commented upon, and prosecuted some of the former principals of a company with which the defendants are connected do not, without more, establish that he was personally biased toward them as required by the statute. If anything, allegations of this nature merely evidence "an *impersonal* prejudice, [going] to the judge's background and associations *rather than his appraisal of the* [*movants*] *personally.*"

The recusal claim raised by petitioners is even less compelling than that raised by their father, Frank Balistrieri. Virtually all of the allegations of prejudice raised in the recusal motions related to Attorney General Warren's conduct towards and comments about Frank Balistrieri. In the materials submitted by the parties in support of their recusal motions (see 2 App. 38-143), the references to petitioner Joseph Balistrieri were not suggestive of any animus against him (see, *e.g.*, *id.* at 41-59), and there were hardly any references at all to petitioner John Balistrieri, who was in his early twenties at the time Judge Warren was Attorney General of Wisconsin (see *id.* at 412).

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[5] As to the allegations contained in the affidavits accompanying the later recusal motions, the court of appeals' conclusion that they were unreliable and irrelevant does not warrant further review by this Court.

Finally, petitioners have completely failed to establish that they were prejudiced in any way by Judge Warren's refusal to recuse himself until six months prior to their trial. On appeal, all but one of the claims of error raised by petitioners related to errors allegedly committed by Judge Evans, not by Judge Warren. The sole exception was the question whether petitioners should have been granted an evidentiary hearing on their motions to suppress evidence. That issue was a purely legal one over which the court of appeals had plenary review and which it resolved against petitioners (see Pet. App. A6-A7, A33-A37).[6]

b. The petition (at 14-19) also challenges the court of appeals' ruling that the denial of a recusal motion brought pursuant to 28 U.S.C. 455(a)—which requires the disqualification of a judge "in any proceeding in which his impartiality might reasonably be questioned"—may not be raised on appeal from a conviction, and may be reviewed, if at all, only by way of a petition for a writ of mandamus. The discussion of the court of appeals on this issue (Pet. App. A32-A33) is, however, both thorough and convincing. Section 455(a) is not designed to protect litigants but, rather, to "promote public confidence in the impartiality of the judicial process" (*id.* at A32, citing H.R. Rep. 93-1453, 93d Cong., 2d Sess. (1974)). Thus, any error in a judge's refusal to recuse himself pursuant to Section 455(a) would not affect a substantial right of the defendant and would therefore not be grounds for reversal. Furthermore, a rule requiring that such claims be raised by way of mandamus serves the important purpose of avoiding any injury to the public perception of the judicial sys-

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[6] Petitioners have not challenged that ruling in this Court.

tem before the injury occurs. To be sure, other circuits have entertained Section 455(a) claims on appeal from a final judgment, but those courts have not addressed the jurisdictional question raised by the Seventh Circuit in this case.[7] There is therefore no conflict among the circuits on this issue.

In any event, this is not an appropriate case in which to resolve the question of the appealability of rulings arising under Section 455(a). As explained above, Judge Warren recused himself a full six months prior to the trial in petitioners' case. Petitioners' claim is just that Judge Warren should have recused himself earlier than he did. Yet because Judge Evans tried petitioners' case and disposed of virtually every legal issue that was presented in their case, petitioners have failed to demonstrate that they would have been entitled to any further relief if their Section 455(a) claim had been entertained on appeal, and if they had prevailed on their claim under that statute.

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[7] Two of the cases cited by petitioners—*United States* v. *Parker*, 742 F.2d 127 (4th Cir.), cert. denied, 469 U.S. 1076 (1984), and *Blizard* v. *Frechette*, 601 F.2d 1217 (1st Cir. 1979)—contain no discussion at all of the jurisdictional issue. A third case, *Davis* v. *Board of School Comm'rs*, 517 F.2d 1044, 1051-1052 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976), simply recited, by way of background and without analysis, the various means by which Section 455(a) has been invoked; it did not refer to or reject the analysis employed by the court of appeals here. In the last case cited by petitioners—*City of Cleveland* v. *Krupansky*, 619 F.2d 576, cert. denied, 449 U.S. 834 (1980)—the Sixth Circuit, in declining to issue a writ of mandamus, similarly did not consider whether Section 455(a) created a right of the litigants that is protectable by appeal.

2. Petitioners also contend (Pet. 20-23) that the district court erred by transferring this case from the Milwaukee division to the Green Bay division of the Eastern District of Wisconsin for purposes of jury selection. That claim is completely insubstantial.

This case was tried a few months after the trial in the gambling case against Frank Balistrieri, a trial that generated a large amount of publicity in the Milwaukee area. Shortly after that gambling trial, the district court conducted an inquiry into incidents involving the jurors in that case, several of whom reported that they had been contacted after the convictions by an investigator who said he was acting on behalf of Frank Balistrieri. Several of the jurors reported that they felt intimidated by the investigator's conduct. Those events also received considerable local publicity. 2 App. 269-271.

As a result of the publicity surrounding the gambling case and its aftermath, the district court decided that jury selection in the extortion case should be conducted in Green Bay, rather than in Milwaukee.[8] The court noted that conducting jury selection in Green Bay would not be a significant inconvenience to the parties or the witnesses, since the rest of the trial would be conducted in Milwaukee (2 App. 256-268). The court also noted the difficulty it had encountered in selecting a jury in the gambling case and it recognized that additional publicity had been generated since the jury selection in that case. Accordingly, the court concluded that selecting jurors

[8] Unlike many other districts, the Eastern District of Wisconsin is not divided into statutory divisions (see 28 U.S.C. 130). Rather, for purposes of jury selection, it has been administratively divided into the Milwaukee jury division and the Green Bay jury division.

from the Milwaukee area "would unduly elongate the procedure and conceivably diminish the quality of those willing to serve" (*id.* at 266). The court stated that potential jurors in the Green Bay area apparently had not been exposed in any significant degree to the same publicity (*id.* at 267). Thus, pursuant to the court's order, jury selection was conducted at Green Bay. After jury selection, the case was moved back to Milwaukee, where the jurors were sequestered for the duration of the trial. See Pet. App. A4-A5.

Rule 18 of the Federal Rules of Criminal Procedure provides the district court with the discretion to "fix the place of trial within the district with due regard for the convenience of the defendant and the witnesses and the prompt administration of justice." The district court clearly did not abuse its discretion in this case. Rule 18 does not require the defendant to be tried in the location of his choice within a district. See *United States* v. *Pepe*, 747 F.2d 632, 648 (11th Cir. 1984); *United States* v. *Lewis*, 504 F.2d 92, 98 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975). Rather, the district court is simply required to give "due regard" to the convenience of the defendant and the witnesses when setting a place for trial. See, *e.g.*, *United States* v. *Pepe*, 747 F.2d at 648; *United States* v. *Burns*, 662 F.2d 1378, 1382 (11th Cir. 1981).[9]

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[9] Similarly, while the Sixth Amendment provides a defendant with the right to a trial "by an impartial jury of the State and district" where the crime was committed, there is no constitutional or statutory right to a trial in the division in which the crime was committed, or at a particular place within the district or division. See *United States* v. *Anderson*, 328 U.S. 699, 704-705 (1946); Fed. R. Crim. P. 18 advisory committee note (1966 Amendment) (collecting cases). It follows a *fortiori* that when a district, such as the Eastern District of

The district court specifically solicited the parties' views about transferring the trial (2 App. 256-258) and, by providing that the trial itself be held in Milwaukee, the court explicitly took account of the convenience of the defendants and the witnesses. That measure eliminated any inconvenience to the witnesses, and it limited the inconvenience to the parties by requiring them to spend only the short period of jury selection in Green Bay. Under these circumstances, the court of appeals correctly concluded that the district court had given due consideration to the factors set forth in Rule 18 (Pet. App. A5).[10]

Petitioners contend (Pet. 21-22) that the district court improperly took into account factors other than those enumerated in Rule 18. In setting the place for trial within the district, petitioners argue, a trial

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Wisconsin, is not separated into statutory divisions, the Sixth Amendment permits trial to be held at any place within the district. See *ibid.* (1979 Amendment); *United States* v. *Lewis*, 504 F.2d at 98; *United States* v. *Fernandez*, 480 F.2d 726, 730 (2d Cir. 1973).

[10] Petitioners allege (Pet. 22-23 & n.4) that the Green Bay division contains a more rural population than does the Milwaukee division, and that the transfer of jury selection to that division therefore resulted in the selection of a jury that did not represent a cross-section of their community. A jury is not, however, required to be selected either from the entire district or from the division in which the crime was committed. *Lewis* v. *United States*, 279 U.S. 63, 72 (1929); *Ruthenberg* v. *United States*, 245 U.S. 480, 482 (1918); *Zicarelli* v. *Dietz*, 633 F.2d 312, 317-320 (3d Cir. 1980), cert. denied, 449 U.S. 1083 (1981). Moreover, the possibility that a jury pool may be more rural or more urban in one area than in another does not violate a defendant's right to a jury drawn from a cross-section of the community. *Zicarelli* v. *Dietz*, *supra*; *United States* v. *Young*, 618 F.2d 1281, 1287-1288 (8th Cir.), cert. denied, 449 U.S. 844 (1980); *United States* v. *Fernandez*, 480 F.2d at 732-735.

court may consider only the three factors expressly listed in Rule 18. There are several answers to this contention. In the first place, the district court's reluctance to "unduly elongate" the jury selection process—which appears to be the consideration that petitioners object to—falls within the language of Rule 18 permitting a transfer to facilitate the "prompt administration of justice." See *United States* v. *Pepe*, 747 F.2d at 647-648; *United States* v. *Betancourt*, 734 F.2d 750, 755-756 (11th Cir.), cert. denied, 469 U.S. 1021 (1984). In any event, the list of factors set forth in Rule 18 is not exclusive. Rather, as long as the district court gives "due consideration" to the factors listed in Rule 18, it may consider other factors as well in determining where within the district to hold the trial. See *United States* v. *Truglio*, 731 F.2d 1123, 1130 (4th Cir.), certs. denied, 469 U.S. 862 and 1076 (1984); *United States* v. *Burns*, 662 F.2d at 1381-1382; *United States* v. *Mase*, 556 F.2d 671, 675-676 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978) (speedy trial factors considered before "promptness" factor was added to Rule 18); *United States* v. *Brown*, 535 F.2d 424, 429-430 (8th Cir. 1976). Cf. *United States* v. *Dickie*, 775 F.2d 607, 610 (5th Cir. 1985) ("the trial court did not abuse its discretion in limiting its consideration to statutory factors"). Other courts have upheld transfers that were necessitated, as this one was, by pre-trial publicity. See *United States* v. *Dickie*, *supra*; *United States* v. *Mase*, *supra*; *United States* v. *James*, 528 F.2d 999 (5th Cir.), cert. denied, 429 U.S. 959 (1976); see also Fed. R. Crim. P. 18 advisory committee note (1966 Amendment). There is nothing in the language or construction of Rule 18 to support petitioners' reading of the rule. To the contrary, pe-

titioners' construction of the rule would defeat the purposes of the rule by preventing a district court from exercising its commonsense discretion to protect the litigants and the integrity of the trial.[11]

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[11] Petitioners' reliance (Pet. 21-22) on *Dupoint* v. *United States*, 388 F.2d 39 (5th Cir. 1967), is misplaced. In that case, the court reversed a conviction where "the real reason" for the transfer of a trial was "the convenience of the prosecution, not the convenience of the defendant" (*id.* at 43 (emphasis deleted)). In its opinion on rehearing, the court stressed that the conviction was reversed because "the *only* consideration for this transfer was the convenience of the Government" and there was "*no* consideration of the convenience of the defendant" (*id.* at 45 (emphasis added)). Thus, *Dupoint* requires only that the statutory factors be considered; it does not hold that other factors may not be. The other decisions relied on by petitioners—*United States* v. *Fernandez*, 480 F.2d 726, 729-730 (2d Cir. 1973), and *United States* v. *Burns*, 662 F.2d 1378, 1381-1383 (11th Cir. 1981)—are distinguishable for essentially the same reason. In *Fernandez*, an intradistrict transfer was criticized because it was made solely for the convenience of the judge, and in *Burns* the court clearly failed to give due regard to the convenience of the defendant and the witnesses. Petitioners concede that the latter two cases stand only for the proposition that the factors in Rule 18 must be given "due regard," and in this case they were. Moreover, in subsequent decisions, both the Second and Fifth Circuits have made it clear that jury prejudice is a permissible factor for a district court to consider in entering a transfer order under Rule 18. See *United States* v. *Mase*, *supra*, and *United States* v. *Dickie*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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